

Introduced by Senator OropezaFebruary 18, 2010

An act to amend Section 1812.117 of the Civil Code, relating to discount buying services.

LEGISLATIVE COUNSEL'S DIGEST

SB 1151, as introduced, Oropeza. Discount buying services.

Existing law provides that a discount buying organization is required to establish a trust account at a federally insured bank or savings and loan association for the deposit of contract payments, as specified. Existing law places certain restrictions on the ability of a discount buying organization to withdraw funds from this trust account. Existing law exempts an affiliate discount buying organization that meets certain requirements from these provisions, and specifies alternate trust account and trust funds withdrawal provisions for these affiliates.

This bill would completely exempt an affiliate discount buying organization that operates under a parent in good standing, as defined, from all the requirements related to the establishment of or withdrawal of funds from a trust account.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 1812.117 of the Civil Code is amended
- 2 to read:
- 3 1812.117. (a) An affiliate discount buying organization *not*
- 4 *exempt pursuant to subdivision (h) from the trust account and*
- 5 *withdrawal of trust funds provisions set forth in subdivision (b) of*

1 *Section 1812.116* may, at its option, and with the express written
2 consent of its parent, comply with the trust account withdrawal
3 provisions set forth in subdivision (b), in lieu of those contained
4 in subdivision (b) of Section 1812.116.

5 (b) The affiliate shall comply with the trust account provisions
6 of subdivision (b) of Section 1812.116, except that:

7 (1) As to each buyer, during the first one-fourth or first six
8 months of the buyer's membership period, whichever is shorter,
9 funds representing no more than one-half of the contract price may
10 be withdrawn from the trust account.

11 (2) During the subsequent one-fourth or six-month period of
12 the buyer's membership period, whichever is shorter, the remaining
13 balance of the contract price may be withdrawn from the trust
14 account.

15 (c) To qualify for the provisions set forth in subdivision (b) *or*
16 *the exemption set forth in subdivision (h)*, (1) the affiliate shall
17 maintain a surety bond of two hundred fifty thousand dollars
18 (\$250,000), and (2) the parent shall maintain an aggregate surety
19 bond of two million five hundred thousand dollars (\$2,500,000)
20 and a letter of credit, as set forth in subdivision (d), for all of its
21 affiliates that qualify for the withdrawal provisions of subdivision
22 (b). The bonds shall be issued by a surety company admitted to
23 do business in this state. A copy of each bond shall be filed with
24 the Secretary of State, with a copy provided to the Attorney
25 General. The affiliate's bond shall be in lieu of the bond required
26 by subdivision (a) of Section 1812.103. The surety bonds shall
27 comply with the requirements of this section and shall be in favor
28 of the State of California for the benefit of consumers harmed by
29 any violation of this title by the affiliate, the failure of the affiliate
30 to comply with the terms of its membership contracts with
31 consumers, and the failure of the affiliate to comply with the terms
32 of any agreement with consumers for the purchase of goods or
33 services, provided the bonds shall cover only pecuniary loss and
34 not exemplary damages or treble damages permitted under
35 subdivision (a) of Section 1812.123, and provided further the
36 parent's bond shall not be drawn on until the affiliate's bond is
37 exhausted.

38 (d) The parent shall continuously maintain and provide to the
39 Attorney General as beneficiary an irrevocable letter of credit
40 issued by a California state chartered bank or a national bank with

its principal place of business in the State of California, in the amount of one million dollars (\$1,000,000), in a form satisfactory to the Attorney General. After the bonds described in subdivision (c) have been exhausted, only the Attorney General, by and through the Attorney General's deputy or assistant, may draw on the letter of credit for the satisfaction of any final judgments based on any violation of this title by the affiliate, the failure of the affiliate to comply with the terms of its membership contracts with consumers, or the failure of an affiliate to comply with the terms of any agreement with consumers for the purchase of goods or services, provided the liability is established by final judgment of a court of competent jurisdiction and the time for appeal has expired or, if an appeal is taken, the appeal is finally determined and the judgment is affirmed, and provided further the letter of credit shall cover only pecuniary loss and not exemplary damages or treble damages permitted under subdivision (a) of Section 1812.123. The letter of credit shall provide that payment shall be made to the Attorney General upon presentation to the issuer of a sight draft stating only the amount drawn and signed by the Attorney General or by an Assistant or Deputy Attorney General. Any amount received by the Attorney General under the letter of credit shall be used exclusively to satisfy final judgments as described in this subdivision. The Attorney General may apply to the court for orders as desired or needed to carry out the provisions of this subdivision.

(e) In addition to other lawful means for the enforcement of the surety's liability on the bonds required by this section, the surety's liability may be enforced by motion after a final judgment has been obtained against an affiliate based on any violation of this title by the affiliate, the failure of the affiliate to comply with the terms of its membership contracts with consumers, or the failure of the affiliate to comply with the terms of any agreement with consumers for the purchase of goods or services. The bond of the parent shall not be drawn on until the bond of the affiliate has been exhausted, as provided in subdivisions (c) and (d). The motion may be filed by the Attorney General, a public prosecutor, or any person who obtained the judgment without first attempting to enforce the judgment against any party liable under the judgment. The notice of motion, motion, and a copy of the judgment shall be served on the surety as provided in Chapter 5 (commencing

1 with Section 1010) of Title 14 of Part 2 of the Code of Civil
2 Procedure. The notice shall set forth the amount of the claim, a
3 brief statement indicating that the claim is covered by the bond,
4 and, if the motion is to enforce liability under the bond provided
5 by the parent, a statement that the bond provided by the affiliate
6 has been exhausted or will be exhausted if the motion is granted.
7 Service shall also be made on the Attorney General directed to the
8 Consumer Law section. The court shall grant the motion unless
9 the surety establishes that the claim is not covered by the bond or
10 unless the court sustains an objection made by the Attorney General
11 that the grant of the motion might impair the rights of actual or
12 potential claimants or is not in the public interest. The court may,
13 in the interest of justice, order a pro rata or other equitable
14 distribution of the bond proceeds.

15 (f) (1) The bond required by subdivision (c) for an affiliate
16 shall be continuously maintained by the affiliate until the date the
17 affiliate ceases to make the election under subdivision (a) or ceases
18 to engage in the business of a discount buying organization. The
19 bond required by subdivision (c) for the parent shall be
20 continuously maintained by the parent until the date all affiliates
21 cease to make the election under subdivision (a) or all affiliates
22 cease to engage in the business of a discount buying organization.

23 (2) Notwithstanding the expiration or termination of any bond
24 required under this section, the bond remains in full force and
25 effect for all liabilities incurred before, and for acts, omissions,
26 and causes existing or which arose before, the expiration or
27 termination of the bond. Legal proceedings may be had therefor
28 in all respects as though the bond were in effect.

29 (3) The letter of credit required under subdivisions (c) and (d)
30 shall be continuously maintained for a period of four years after
31 all affiliates cease to make the election under subdivision (a) or
32 cease to engage in the business of a discount buying organization,
33 provided the period shall be extended until there is a final
34 judgment, as described in subdivision (d), entered in each action
35 seeking relief that may be covered by the letter of credit if the
36 action was filed before the expiration of the four-year period.

37 (g) Subdivision (a) of Section 1812.121 does not apply to a
38 discount buying organization that offers substantially equivalent
39 alternative at-home ordering service through other generally
40 available channels of communications, such as the Internet, for

1 the same categories of goods and services, provided the ordered
2 goods are shipped either to the home or to a freight receiver within
3 20 miles of the buyer's residence at the time the buyer entered into
4 the contract for discount buying services.

5 *(h) The trust account and trust funds withdrawal requirements*
6 *set forth in subdivision (b) and in subdivision (b) of Section*
7 *1812.116, shall not apply to an affiliate of a parent in good*
8 *standing.*

9 ~~(h)~~

10 (i) For purposes of this section, the following terms apply:

11 (1) "Affiliate" or "affiliate discount buying organization" means
12 a discount buying organization that is a subsidiary of a parent *or*
13 *parent in good standing*, as defined in paragraph (4), or operates
14 under a franchise, as defined in paragraph (3), granted by a parent
15 *or parent in good standing.*

16 (2) "Consumer" or "buyer" means and includes a client or
17 member of an affiliate discount buying organization.

18 (3) "Franchise" has the same meaning as in Section 31005 of
19 the Corporations Code.

20 (4) "Parent" means a business entity that directly or indirectly
21 has franchised or operated 25 or more discount buying
22 organizations for 10 years or more.

23 (5) *"Parent in good standing" means a parent, as defined in*
24 *paragraph (4), that meets all of the following requirements:*

25 (i) *It has franchised or operated a discount buying organization*
26 *for at least five years that has facilities in this state of not less than*
27 *8,000 square feet in size.*

28 (ii) *It has continually maintained surety bonds in the amount*
29 *of two million five hundred thousand dollars (\$2,500,000) and an*
30 *irrevocable letter of credit in the amount of one million dollars*
31 *(\$1,000,000) in favor of the State of California for the protection*
32 *of consumers for at least five years.*

33 (iii) *In its first five years of operations in this state, no claim*
34 *has been made in this state against its surety bonds.*

35 (iv) *In its first five years of operations in this state, the Attorney*
36 *General has not drawn on its letter of credit.*

- 1 (v) *In its first five years of operations in this state, no claim has*
- 2 *been made in this state against the surety bonds of its affiliates*
- 3 *that operate in this state.*